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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES A. MACK AND CONCORD CASUALTY AND SURETY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above case on November 13, 1934 (R. 29–30), affirming a judgment of the United States District Court for the Eastern District of New York (R. 16–17).

OPINIONS BELOW

The opinion of the District Court (R. 14–16) is reported in 6 F. Supp. 839. The opinion of the Circuit Court of Appeals (R. 27–29) is reported in 73 F. (2d) 265.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 13, 1934 (R. 29–30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the ratification of the Twenty-first Amendment to the Constitution deprived the Government of the United States of its right of action on the bond involved herein, which was executed and delivered pursuant to the provisions of Section 26, Title II, of the National Prohibition Act.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra*, pp. 9–10.

STATEMENT

The facts set forth in the petitioner's complaint (R. 4–10), which was dismissed by the District Court upon motion of the respondent Mack (R. 12–13), may be summarized as follows:

On July 31, 1930, the Collector of Customs of the Port of New York arrested one Hillary Cathell and one Adrian Van Austin and seized the motor boat *Wanda* with a cargo of intoxicating liquors for violation of the laws of the United States (R. 5).

On October 31, 1930, the respondents, as principal and surety, respectively, executed a bond (R. 5–6)

for the release of the vessel, pursuant to the provisions of Section 26, Title II, of the National Prohibition Act, conditioned as follows (R. 9–10):

> NOW, THEREFORE, the condition of this obligation or bond is such, that if the said principal shall return the aforesaid conveyance or vehicle to the custody of the officer approving this bond on the day of the criminal trial to abide the judgment of the court; and, in case the said property shall be forfeited to the United States, or the court shall order a sale of said conveyance or vehicle, that if the said principal shall pay the difference between the value of said vehicle or conveyance at the time of the execution hereof, which is hereby stipulated to be one-half of the penal sum of this bond, and its value on the date of its return as aforesaid, less depreciation due to reasonable wear and tear of ordinary use, and the said principal shall pay off any liens or encumbrances thereon except the following liens heretofore existing, namely:_____ then this obligation to be void, otherwise to remain in full force and effect.

This bond was duly approved by the Assistant Collector of Customs (R. 10).

On January 26, 1931, Cathell and Van Austin pleaded guilty to the charge of possession of intoxicating liquor and were sentenced. The possession charged was incident to transportation of liquor on the *Wanda*. (R. 5.) The vessel was not

then produced, nor was it produced at any time thereafter (R. 6).

On July 19, 1933, the Government brought suit upon the bond (R. 4). On August 25, 1933, an answer was interposed by the respondent Surety Company (R. 3, 15). On December 5, 1933, the Twenty-first Amendment to the Constitution became effective. On April 13, 1934, the respondent Mack moved to dismiss the suit upon the ground that the statute under which the bond was given had become inoperative by virtue of the repeal of the Eighteenth Amendment, relying upon the decision of this Court in the case of *United States* v. *Chambers et al.*, 291 U. S. 217 (R. 12–13). On May 7, 1934, the motion to dismiss was granted by the District Court on the ground that as no forfeiture of the vessel was had following the pleas of guilty entered by Cathell and Van Austin, and such forfeiture could not be granted after repeal of the Eighteenth Amendment, if the vessel were then before the court, it would seem "to be equally true that no judgment upon the bond which was given as bail for the vessel's return to the custody of the seizing officer, can be entered, for otherwise the surety could be held while the res could not" (R. 16). On May 21, 1934, an order was entered by the District Court, granting the motion and directing entry of judgment for the defendant. (R. 16–17). The judgment was affirmed by the Circuit Court of Appeals (R. 29).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding the doctrine of *United States* v. *Chambers et al.*, 291 U. S. 217, to be applicable to the instant case.

2. In holding that the rights of the Government on the bond in question were no greater than its right of forfeiture of the vessel would be if the vessel were now in possession of the Government.

3. In holding that the bond contemplated the sovereign's continued power to confiscate.

4. In holding that the action does not depend wholly upon the common law.

5. In refusing to hold that, the right to be indemnified under the terms of this bond having accrued prior to the effective date of the Twenty-first Amendment to the Constitution, the enforcement of that right was not dependent upon the continued existence of the National Prohibition Act.

6. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision below appears to be erroneous. We submit that the right to recover under the bond in question was not dependent upon the continued power of the Government to confiscate the vessel, which ceased with the repeal of the Eighteenth Amendment to the Constitution. The bond was conditioned solely upon the return of the vessel to the custody of the approving officer upon the day

of the criminal trial, to abide the judgment of the court, and the only ground for discharge of the bond was impossibility of performance occasioned by act of God, act of the obligee, or act of law intervening before the vessel was to be redelivered to the United States. See *United States* v. *Warnell*, 67 F. (2d) 831 (C. C. A. 5th); *United States* v. *Fiedler*, 45 F. (2d) 874 (E. D. N. Y.); *United States* v. *Stephens*, 1 F. Supp. 33 (S. D. Fla.); *United States* v. *One International Truck*, 3 F. Supp. 898 (E. D. N. Y.); *United States* v. *One Ford Automobile*, 18 F. (2d) 338 (E. D. La.); *The Patricia*, 1 F. Supp. 807 (E. D. N. Y.). When the persons in charge of the vessel were convicted, there then arose the question of whether the vessel might be forfeited and sold. In order to maintain an action *in rem* against the vessel the Government must have had possession of the same. In failing to return the vessel, according to the conditions of the bond, the respondents defeated the jurisdiction of the court to order a sale of the vessel. The criminal case having been terminated by final judgment and sentence, and the respondents having failed to comply with the conditions of the bond, the liability to the Government for the loss of the value of the vessel became fixed, and there arose under the bond a new and distinct obligation, which was fully matured long prior to repeal of the Eighteenth Amendment. See *United States* v. *John Barth Co.*, 279 U. S. 370; *Gulf States Steel Company* v. *United States*,

287 U. S. 32; *United States* v. *Warnell, supra*. That vested contractual rights survive the repeal of the statute under which the transaction arises was held by this Court in *Steamship Company* v. *Joliffe*, 2 Wall. 450, and *Coombes* v. *Getz*, 285 U. S. 434.

The decision of this Court in the case of *United States* v. *Chambers et al.*, 291 U. S. 217, seems clearly to have been intended to apply solely to prosecutions and penalties arising under the National Prohibition Act, and we think the Circuit Court of Appeals erred in holding it applicable to the instant case.

2. While no other Circuit Court of Appeals has passed upon the question here involved, the question has come before three United States District Courts in which the decisions were favorable to the Government.

In the case of *United States* v. *Herman H. Sohn* (D. C. R. I.), decided May 1, 1934, without opinion, the court overruled a demurrer which was based upon repeal of the Eighteenth Amendment.

In the case of *United States* v. *Biegert*, 8 F. Supp. 884 (D. C. N. J.) the court overruled a motion to dismiss a similar suit where the question of repeal was raised by the defendant.

In the case of *United States* v. *E. & S. Motor Transportation Company, Inc.*, 8 F. Supp. 844 (S. D. N. Y.) in which the answer set up the defense of repeal of the Eighteenth Amendment, the court granted plaintiff's motion for judgment. The Cir-

cuit Court of Appeals for the Second Circuit reversed the judgment of the District Court in that case (73 F. (2d) 267).

Neither the case of *United States* v. *Sohn* nor the case of *United States* v. *Biegert, supra,* has gone to judgment; hence no appeal has been taken in either case. While there is as yet no conflict between Circuit Courts of Appeals, there are now pending in the District Courts in other Circuits, particularly the Third and Seventh Circuits, a number of suits on similar bonds in which hearings and decisions are being postponed pending a decision by this Court upon the question involved in the instant case.

3. The Government now has pending 575 vehicle bond cases, involving approximately $400,000, in which similar breaches occurred prior to repeal of the Eighteenth Amendment; of these, 160 cases, involving approximately $160,000, are now in suit in various United States District Courts. A decision by this Court as to the effect of the repeal of the Eighteenth Amendment upon the Government's right of action on these bonds, and the applicability of the *Chambers* case, would greatly facilitate administrative and judicial disposition of these cases and would be in the public interest.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

FEBRUARY 1935.

APPENDIX

National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 308, 315:

SEC. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented * * *.

(U. S. C., Title 27, Sec. 12.)

* * * * * *

SEC. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or

conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. * * *

(U. S. C., Title 27, Sec. 40.)

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